Office - Supreme Court, U.S.
FILED
AUG 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-99

PHILIPPINE PRESIDENT LINES, INC., MANILA,

Petitioner,

v.

JAMES TURNER and JAPAN LINE, LTD.,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK POZZI
RAYMOND J. CONBOY
910 Standard Plaza Building
1100 SW Sixth Avenue
Portland, Oregon 97204
Telephone: (503) 226-3232
Attorneys for Respondent
James Turner

QUESTION PRESENTED FOR REVIEW

Is certiorari appropriate to review a decision of the Ninth Circuit upholding a longshoreman's verdict and judgment against a shipowner for injuries sustained from the collapse of a stow of cargo where the sole issue presented by the shipowner's Petition is whether a vessel has "* * * a higher standard of care to United States longshoremen when loading cargo in foreign ports than when loading cargo in United States ports" and the record below discloses the following:

(a) The case was not tried or the jury instructed upon the issue presented by the shipowner's Petition;

(b) The case was tried upon a theory that the chief officer and mates of the Petitioner's vessel violated or negligently performed a universal maritime safety custom and practice which resulted in injury to Respondent Turner; and unrebutted

lay and expert testimony was introduced in support of that position;

(c) The Ninth Circuit upheld the resulting verdict in favor of Respondent Turner after measuring his evidence against the requirements of Scindia Steam Navigation Co., Ltd. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981), and properly finding that the evidence met the requirements of Santos;

(d) The decision of the Ninth Circuit did not hold, contrary to the contentions of Petitioner, that a vessel owes "a higher standard of care to United States longshoremen when loading cargo in foreign ports than when loading cargo in United States ports"; and

(e) There is no conflict of decision among the Circuit Courts of Appeal.

TABLE OF CONTENTS

	Page
Question Presented for Review.....	1
Statement of the Case.....	1
Reasons Why the Writ Should Not Be Granted.....	10
1. The decision of the Ninth Circuit does not impose upon a vessel a higher standard of care when loading in foreign ports than when loading in United States ports. Turner's case was not tried in the District Court, nor was the jury instructed, upon such a theory. The issue before the Ninth Circuit was whether plaintiff's evidence met the requirements of Scindia Steam Navigation Co. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1, (1981). The Ninth Circuit considered Turner's evidence in the light of Santos and properly held that Turner had made out a jury question.....	10
2. There is no conflict of decision among the circuits with respect to the question presented for review.....	24
Conclusion.....	26

TABLE OF AUTHORITIES

Page

CASES

Austerberry v. U.S., 169 F2d 583, 593 (CA 6, 1948)..... 7

Bohle v. Matson Navigation Co., 243 Or 196, 412 P2d 367 (1966)... 7

Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981)..... 23

Marant v. Farrell Lines, Inc., 550 F2d 142, 143 (CA 3, 1977).... 23

Nichiman Company, Inc. v. M.V. Farland, 662 F2d 319, 333 (CA 2, 1972)..... 23

O. F. Shearer & Sons v. Cincinnati Marine Service, Inc., 279 F2d 68 (CA 6, 1960)..... 7

Ruffino v. Scindia Steam Navigation Co., 559 F2d 861 (2d Cir 1977)... 24

Scindia Steam Navigation Co., Ltd. v. De Los Santos, --- US ---, 101 S Ct 1614, 68 L Ed2d 1 (1981) ii,10 12

The Cananova, 297 F 658, 662 (E.D. Penn, 1923)..... 8

The Fred M. Laurence, 15 F 635, 636 (E.D. Ny, 1883)..... 7

The Grace A. Barrett, 73 F Supp 832 (S.D. Ny, 1947)..... 8

The Joseph B. Thomas, 81 F 578
(N.D. Cal, 1897)..... 7

The Louise Rugge, 239 F 458, 462
(CA 3, 1917)..... 8

The New York, 175 US 187,
204-205 (1899)..... 7

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-99

PHILIPPINE PRESIDENT LINES, INC., MANILA,

Petitioner,

v.

JAMES TURNER and JAPAN LINE, LTD.,

Respondents.

BRIEF OF RESPONDENT JAMES TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petition filed by Philippine President Lines, Inc. is a companion to that filed by Japan Line, Ltd., No. 81-2349, although the questions presented by the two Petitions are different.

Respondent Turner believes that Philippine President Lines has omitted

from its Petition much that is material to this Court's inquiry whether to grant or deny certiorari. Accordingly, the evidence on which Plaintiff's verdict and judgment were based is set forth in greater detail below.

Respondent James Turner, a longshoreman employed at the Port of Longview, Washington, suffered brain damage and resulting psychomotor seizure epilepsy when a cargo of plywood, defectively shored when it was stowed aboard a vessel in Japan, collapsed beneath his feet.

Turner brought an action against Petitioners Philippine President Lines, Inc. as owner of the vessel and against Respondent Japan Line, Ltd. as time charterer. (CR 1, 76, 77).

Turner was injured on June 13, 1974, while employed in the lower hold of the vessel PRESIDENT QUEZON (CR 393, 394; Tr. 96-97, 104-105, 111, 159, 170,

172). He was standing on top of a stow consisting of stacked bundles of plywood when the bundles collapsed, carrying Turner with them. Turner's head struck a steel stanchion. (Tr. 111-112, 170, 172).

The stow collapsed because the bundles were stacked on each other against the curvature or "sheer" of the vessel's hull, and there was no shoring underneath. (Tr. 121-122, 146-147, 152, 162-163, 167). When layers of cargo are stacked on one another against the sheer of the hull, each layer rests partly on the bundle below it and partly above a void. Under such circumstances, it is necessary for marine carpenters or longshoremen to nail together a wood platform consisting of dunnage, vertical shoring and horizontal shoring in the vacant space, so that upper layers of cargo will have a firm support, and will not

be resting above thin air against the curvature of the hull. (Tr. 146-147, 152, 162-163, 167, 174-175, 120-121, 173).

It was undisputed that neither plaintiff nor his stevedore employer had any reason to suspect that the plywood cargo was unstable because of lack of shoring. (Tr. 122, 163, 174). Thus, the condition of the stow presented a life threatening trap, concealed from the longshoremen required to work about it.

Two expert witnesses, sea captains called by the plaintiff, testified without contradiction or rebuttal that it is the obligation and practice of the vessel's captain and mates to inspect and supervise the work of shoring cargo against the sheer of the hull. Lack of shoring, or improper shoring, may permit the cargo to shift in the hold when the vessel rolls at sea, threatening not only the

cargo but the vessel and crew. (Tr. 144, 147, 153, 167). For those reasons, as well as to protect longshoremen or seamen required to work about the stow (Tr. 144, 146, 147), it is both the duty and practice of the master and mates of all vessels of every country to supervise personally the shoring of the cargo in those areas where it is stowed against the sheer of the hull.

Captain William Brandt, a ship's officer for 25 years with additional experience as a maritime consultant and stevedore superintendent, testified for Turner that it is both the custom and responsibility of the officer in charge of a vessel to see that shoring is put in place (Tr. 145), and he cannot rely upon others to carry out this responsibility. (Tr. 149). Either the captain or one of his mates is always on watch on the vessel (Tr. 149, 150). The captain's

replacement is the "chief mate", who is also generally called the "loading mate" (Tr. 149, 150). The mate is supposed to check to be sure that the cargo is properly loaded, especially "at the bottom of the hatch". (Tr. 151, 152). The custom and practice of the master is the same on all vessels of all countries (Tr. 143-145).

Captain Henrik Sievers, a seaman and ship's officer for 50 years, testified for Turner that the duties of a master do not vary from one ship or nationality to another, that it is improper to stow cargo against the sheer of the vessel without shoring, and that it is the responsibility of the master to see that the cargo is properly stowed and shored. (Tr. 165-168).

The chief officer of the vessel PRESIDENT QUEZON, Captain Santos Pucan, was listed as a witness in the Pretrial Order by the Petitioner (CR 402), and

was actually brought to the trial by the Petitioner and was present in the courthouse during the trial (Tr. 242). Nevertheless, Captain Pucan did not testify. Although the Ninth Circuit did not find it necessary to say so (App-12, ftn 3; 651 F2d at 1305), it is a commonplace of maritime law that once a party has made out a prima facie case against a vessel, the failure of the shipowner to call available crew members in rebuttal is "as fatal as positive evidence in support or confirmation of the charge." The New York, 175 US 187, 204-205 (1899); O. F. Shearer & Sons v. Cincinnati Marine Service, Inc., 279 F2d 68 (CA 6, 1960); The Fred M. Laurence, 15 F 635, 636 (E.D. NY, 1883); The Joseph B. Thomas, 81 F 578 (N. D. Cal, 1897); Austerberry v. U. S., 169 F2d 583, 593 (CA 6, 1948); Bohle v. Matson Navigation Co., 243 Or 196, 412 P2d 367 (1966); The Cananova, 297 F 658,

662 (E. D. Penn, 1923); The Louise Rugge, 239 F 458, 462 (CA 3, 1917); The Grace A. Barrett, 73 F Supp 832 (S. D. NY, 1947).

There was testimony that shoring requires many hours of labor, so that the ship's officers had ample time to inspect the work (Tr. 175). The vessel's log noted the hour that the marine carpenters who supposedly were to perform the shoring work went into the hatch where injury occurred, so that the defendants could not claim ignorance of the time or place that the shoring was to be carried out. (Def. Ex. 2002; Tr. 221, 258).

Thus, there was proof that it is the practice of the ship's captain and mates to supervise the work of shoring cargo stowed against the sheer of the hull, that on the PRESIDENT QUEZON the cargo was not shored, and as a result the stow collapsed while Turner was at work on it. Moreover, this testimony

was uncontradicted, since the vessel owner called neither Captain Pucan, who had been brought to the courtroom by the vessel owner, or any other witness to dispute either the scope of the crew's duties or the facts leading to Turner's injury.

By agreement of the parties, the case was tried to a jury before a United States Magistrate. The jury returned a verdict against both the vessel owner (Petitioner Philippine President Lines, Inc.) and charterer (Japan Line, Ltd.). (CR 413, 414). Both defendants filed motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. (CR 416, 448). The Magistrate granted judgment n.o.v. in favor of both defendants, but denied the alternative motions for new trial. (CR 530, 533, 534). To satisfy the requirements of the Magistrate's Act, a United States District Judge signed

the order directing the clerk to enter a judgment of dismissal (CR. 534), although the judge did not actually participate in the trial. The United States Court of Appeals for the Ninth Circuit ordered the judgment reinstated and held that Petitioner was entitled to indemnity, for any damages paid to Turner, from the charterer Japan Line, Ltd. Petitioner had filed a cross-claim for indemnity against Japan Line. (CR 214, 215).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The decision of the Ninth Circuit does not impose upon a vessel a higher standard of care when loading in foreign ports than when loading in United States ports. Turner's case was not tried in the District Court, nor was the jury instructed, upon such a theory. The issue before the Ninth Circuit was whether plaintiff's evidence met the requirements of Scindia Steam Navigation Co. v. De Los Santos,

--- US ---, 101 S Ct 1614, 68 L Ed2d 1, (1981). The Ninth Circuit considered Turner's evidence in the light of Santos and properly held that Turner had made out a jury question.

The sole question presented by Petitioner is whether a vessel has "* * * a higher standard of care to United States longshoremen when loading cargo in foreign ports than when loading cargo in United States ports." A grant of certiorari to decide that question would be improvident, because the issue is not raised by the record below. Respondent Turner did not try his case upon any such theory. The jury was not instructed upon such a theory. The Magistrate did not grant judgment notwithstanding the verdict for Turner's failure to meet such a burden. Turner did not urge such a theory on appeal, either in briefs or argument. The Ninth Circuit held only that Turner's

evidence satisfied the requirements of Scindia Steam Navigation Co., Ltd. v. De Los Santos.

The shipowner defended this case as though a harbor worker is fated to lose every negligence action brought against a vessel regardless of the quality of the evidence. Turner offered unrebutted proof that the master and mates were negligent in the performance of safety customs and practices observed by all ship's officers. He called expert witnesses to testify that the master and mates of all vessels of all countries supervise the shoring of cargo against the sheer of the hull. He produced evidence that the work of shoring takes many hours, and from the vessel's log proved that the master knew of the hour the shoring crew came aboard and went into the hatch where injury occurred.

The defendants called no witnesses at all (Tr. 222, 223), not even the ship's captain who was in the courtroom, and, indeed, did not even cross-examine Captain Sievers, one of Turner's experts, who had testified that it is the responsibility of the master to see that cargo is properly stowed and shored. (Tr. 165-168).

Turner made a factual argument that he was injured because the vessel failed to comply with maritime custom and practice observed by all ship's officers. He did not rely upon some theory that a vessel owner has an obligation imposed by law to supervise the loading of cargo in foreign ports. In other words, plaintiff proved his case by establishing as a matter of fact, through witnesses, what ship's officers have customarily done in the past and what in actual practice they are supposed to do to

insure the safety of the vessel and crew. Plaintiff did not seek, or obtain, any instructions that as a matter of law the vessel owner was obligated to supervise the work of foreign stevedores. Indeed, the trial judge pointedly instructed that no such obligation existed. (Tr. 299).

The trial judge read plaintiff's allegations of negligence to the jury. They were as follows:

> "In failure to require the shoring of the plywood in the lower hold of the No. 2 hatch in such a manner that it would not give way while workmen, including the plaintiff, were employed upon the walking and working surface of the plywood. Next, in failing to inspect the shoring to determine that it was properly constructed. Next, in failing to require that the shoring be * * * properly constructed and installed in the Port of Kushiro. And next, in failing to warn longshoremen discharging the plywood cargo, including the plaintiff, that the shoring was not properly constructed and installed. And next, in failing to require the use of H or vertical shoring in the wing tiers." (Tr. 297).

The Court then instructed that a shipowner must use "reasonable care in order to

avoid injury to a longshoreman aboard the vessel in any situation in which it can reasonably be anticipated that a failure to use such care might result in such injury," (Tr. 297, 298), and defined reasonable care and negligence in the manner common to tort actions based upon negligence:

> "Reasonable care is that care which persons or corporations of ordinary prudence, exercise in the management of their own affairs in order to avoid injury to themselves or to others. Failure to use such care is negligence. Negligence, therefore, is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person or corporation would do under the same or similar circumstances. The care should be in keeping with dangers apparent or reasonably to be expected at the time and place in question." (Tr. 298).

The trial court instructed that the vessel owner "* * * has no duty to supervise the minute details of work entrusted to a competent stevedore, so long as the shipowner uses reasonable care." (Tr. 299).

The trial judge did not instruct that the vessel had a duty imposed by law to inspect the work of foreign stevedores. To the contrary, the trial judge instructed that the general authority of the master over his vessel "* * * does not create a duty on the part of the shipowner to supervise the work of the contractor hired to load or unload the cargo." (Tr. 299). Accordingly, the sole issue raised by the shipowner in its Petition was not presented as a basis of recovery to the trial jury.

Moreover, the Ninth Circuit did not hold, on Turner's appeal, that Turner was entitled to recover because the vessel owner had a legally imposed duty to inspect the work of foreign stevedores. The Ninth Circuit deferred decision of Turner's appeal until Santos was decided by this Court, and wrote its opinion in the light of Santos. While

Part IIA of the Ninth Circuit's opinion (entitled "Vessel's Duty to Longshoremen") contains some obiter unnecessary to the decision, with which this Court in an appropriate case may agree or disagree,[1] the Court need look no further than Part IIB of the decision (entitled "Sufficiency of the Evidence"), to determine that the Ninth Circuit properly measured plaintiff's evidence against the requirements of

---

1. The Ninth Circuit expressed the view that a vessel "* * * can insure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore." "Foreign stevedore", in the context of the Ninth Circuit's decision, refers to any "onloading stevedore", whether from a foreign country or a United States port other than the port of discharge. Since uncontradicted evidence established that ship's officers do supervise the kind of stowage which resulted in Turner's injury, the general views of the Ninth Circuit, which were not an issue before this Court in Santos, are dictum.

Santos. Material portions of Part IIB are set forth below:

> "The next question we must consider is whether the plaintiff presented sufficient evidence from which the jury could have concluded that the vessel knew or should have known of the lack of shoring in the hold, and of the resulting danger. We think that sufficient evidence was presented.
>
> * * * * *
>
> As noted above, the plaintiff presented experts who testified as to the custom in the industry with respect to the master's, and hence the vessel's, responsibility. Defendants argue that this testimony was irrelevant and entitled to no weight at all, because the experts spoke in terms of the master's duty to ensure the 'seaworthiness' of the vessel, a concept supposedly irrelevant under § 905(b). This argument, however, misses the point. The experts testified not about legal conclusions ('unseaworthiness' or 'negligence') but about custom in the industry with respect to the master's duties. Furthermore, the master is responsible for the seaworthiness of the vessel; he is simply not liable without fault to injured longshoremen. * * * Since the jury was quite properly not instructed in terms of strict liability for unseaworthiness, there is no possibility that it might have

confused the two related meanings of the term.

The Supreme Court in Scindia observed that a 'necessary inquiry is whether the pertinent statutes, regulations or custom place or assume a continuing duty on the vessel.' 101 S Ct at 1626 (Emphasis added).

We believe that the expert testimony offered by plaintiff was relevant, and perhaps necessary, to establish the customary scope of the master's duties.

In addition to this expert testimony, plaintiff offered the testimony of longshoremen as to how the cargo should have been shored and how long the shoring should have taken; entries into the ship's log noting when the marine carpenter entered the hold; and testimony that the master or his mates were responsible for continuous supervision of the loading operations, particularly the shoring of the cargo. Plaintiff also produced evidence that the stow of the cargo was unreasonably dangerous to the offloading longshoremen, and that the defect could not[2] have been discovered by them." (App-10-12; 651 F2d 1300, 1304-1305).

---

2. The underlined word was omitted from the lower court's opinion as set forth in the Appendix to the Petition (App-12).

In Santos, the majority and all concurring justices of this Court agreed that a harbor worker may make out a case of negligence based upon the vessel's violation or negligent performance of a custom and practice of the sea. (68 L Ed2d 1, 15, 18, 20, 21). It appears to have been this Court's intention not to preclude recovery in any case where an injured harbor worker could prove factually that he was injured through a vessel's failure to take action of the kind traditionally undertaken by the crew with respect to cargo operations. In essence, the Court recognized that without the taking of evidence a judicial tribunal cannot know the extent of the crew's traditional involvement in the stowage and discharge of cargo.

Respondent Turner proved, through the testimony of two sea captains, that it is the universal practice of captains

and mates of all nationalities to supervise the work of stowing cargo against the sheer of the hull, since lack of shoring, or improper shoring, may threaten not only the cargo but the vessel and crew. (Tr. 144, 147, 153, 167). The vessel failed to call its own chief officer to the witness stand in rebuttal, although he was present in the courtroom and could have disputed the testimony of plaintiff's experts if it was not true.

Although not before the jury, a document in the Clerk's Record contains material which indicates why Captain Pucan did not testify. Motoi Shikano, an executive of the marine carpentry firm which was supposed to do the shoring work on the vessel PRESIDENT QUEZON, filed an affidavit that his company from time to time "at the request of Japan Line, Ltd. rendered shoring and lashing work for Japan Line's own vessels

and/or chartered vessels. All works were done under the supervision and direction of the chief officer of the vessel and/or often under the supervision of a port captain dispatched from Japan Line, Ltd." (CR 45). With respect to the PRESIDENT QUEZON, Mr. Shikano stated: "The shoring work aboard said vessel began on May 22 at 1430 and continued until the 24th at 2130. All of the work was done under the chief officer's supervision and with his approval." (CR 46). (Emphasis added).

Mr. Shikano's affidavit establishes, if any proof is required, that the testimony of plaintiff's experts actually does reflect the duty of the master and mates under maritime custom and practice. Moreover, more than one recent case contains proof that ship's officers do in fact supervise important details of the stowage of cargo. Sometimes the vessel itself

offers testimony that its officers have supervised the stow. See, e. g., Nichiman Company, Inc. v. M.V. Farland, 462 F2d 319, 333 (CA 2, 1972); Lemon v. Bank Lines, Ltd., 656 F2d 110 (CA 5, 1981); Marant v. Farrell Lines, Inc., 550 F2d 142, 143 (CA 3, 1977).

In summary, the issue presented for this Court's consideration by the Petition has no support in the record. There was uncontradicted evidence of Petitioner's violation or negligent performance of a maritime custom and practice, which resulted in injury to Turner. The trial court neither instructed the jury that the shipowner owed a general duty imposed by law to supervise the work of foreign stevedores (in fact the court instructed to the contrary), nor was the decision of the Ninth Circuit based on the existence of a legal obligation. Turner proved factually the existence of a custom and

practice which the shipowner violated. That proof was adequate under Santos to make out a jury question.

2. There is no conflict of decision among the circuits with respect to the question presented for review.

Philippine President Lines does not contend that the decision below is in conflict with any other Circuit. However, the decision below, in stating that the vessel "* * * had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of care, have corrected or warned of" (App-9, 10), indicates further by footnote that "to the extent that this holding is inconsistent with the result reached in Ruffino v. Scindia Steam Navigation Co., 559 F2d 861 (2d Cir 1977), we must * * * disagree with the Second Circuit." The Ninth Circuit thought that Ruffino might

be construed to hold that the vessel cannot be "held liable to an offloading longshoreman for injuries which result from the loading stevedore's negligence." (App-7; 651 F2d at 1303).

Factually, our case is unlike Ruffino, so that there is no conflict of decision between the Second and Ninth Circuits. Ruffino involved injury to a longshoreman who "stepped on the end of a rug which overhung a space between two pallets of tea". Unlike our case, there was no evidence in Ruffino that the condition of the stow was of a nature to endanger the vessel and crew, just as there was no evidence either in Ruffino or our case that it is the practice of the captain and mates to eliminate all spaces, however small or insignificant, between packages of cargo. Under such circumstances, the Second Circuit held that the shipowner "* * * was not required to

supervise the minute details of the loading stevedore's work", a ruling factually consistent with the case at bar, where shoring of the cargo against the curvature of the ship's hull was anything but a "minute detail".

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK POZZI
RAYMOND J. CONBOY

Attorneys for Respondent
James Turner